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No. 91-1382

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

THE SHUBERT ORGANIZATION, INC., et al.,

Petitioners,

-against-

THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

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April 24, 1992

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Is a claim that designation of certain Broadway theatres as Landmarks violates the Takings Clause of the Fifth Amendment premature, where petitioners failed to utilize any of the provisions of New York City's Landmarks Law permitting a property owner to seek authorization to alter or even demolish a landmarked structure on grounds which include economic hardship?

2. Was the New York City Landmarks Commission authorized to designate certain Broadway theatres as landmarks, where this Court specifically upheld the constitutionality of the New York City's Landmarks Law in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), and then reaffirmed that holding nine years later in

Nollan v. California Coastal Commission, 483 U.S. 825 (1987)?

3. Does the "special demolition permit" requirement of New York City's Zoning Regulation unconstitutionally discriminate against theatre owners subject to its provisions?

LIST OF PARTIES

Respondents accept the list of parties provided by petitioners.

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RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK

STATEMENT OF THE CASE

(1)

The Landmarks Law and the Designation of Certain Theatres as Landmarks

Pursuant to New York City Charter § 3020 and New York City Administrative Code §§ 25-301 et seq., commonly referred

to as the "Landmarks Law," a building may be designated a Landmark if it is at least thirty years old and "has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state, and nation...." Landmarks Law § 25-302(n). These criteria also apply to the interiors of structures, which may be designated, in whole or in part, as Interior Landmarks, as long as the spaces in question are "customarily open or accessible to the public, or to which the public is customarily invited...." Landmarks Law § 25-302(m).

A permit mechanism is available for owners of designated buildings who wish to alter or to demolish a landmarked structure. This includes a certificate of appropriateness issued on the ground of insufficient economic return. See, Landmarks Law §§ 25-306, 25-307, 25-309.

As early as 1978, as a result of a memorandum of agreement with the federal Advisory Council on Historic Preservation entered into pursuant to 16 U.S.C. § 470(f), the New York City Landmarks Preservation Commission (the "Landmarks Commission" or "Commission") had begun considering the possibility that various Broadway theatres might be worthy of Landmark status (A3084).[1] Thereafter, a preliminary study identified thirty-five such theatres, including the twenty-two whose designations are contested here (A3084). Ten more

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[1] Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix filed with the Appellate Division of the New York State Supreme Court. The letter "R" precedes references to pages in the original record of the proceedings before the Landmarks Commission submitted to the Appellate Division but not included in the Appendix. References to the Appendix to the instant petition consist of the page number followed by an uncapitalized "a."

structures had been identified by April 13, 1982, when the Commission voted to calendar public hearings to consider the designation of forty-five Broadway theatres as Landmarks (R8-9).

Two days of public hearings took place on June 14 and 15, 1982; a third public hearing was scheduled for October 19, 1982, in order to permit preparation by various interested parties, including petitioners, of reports and other materials relating to the historical, cultural, and architectural significance of the theatres under consideration (A3086). After the October 19, 1982 public hearing, the record was left open for the submission of additional materials (A2756). The instant petitioners not only testified at the hearings, but, on April 22, 1983, submitted an extensive report prepared at their request by an architectural firm (A3088-3089). The

Commission then held a series of twenty-nine public executive sessions, commencing on April 21, 1984 and continuing through January 5, 1988 (A3091-3092).

The Commission continued to receive voluminous materials throughout this period, including a second report commissioned by petitioners and issued on March 16, 1987 (A3114). Commission staff members also prepared extensive 35- to 40-page designation reports for each building under consideration, detailing the architectural and production history of each individual theatre as well as the common history of the Broadway stage. See, e.g., A297-391, A371-445.

On August 6, 1985, the Landmarks Commission voted to designate the exterior and/or interior of three theatres as Landmarks (A3092). During its consideration of these designations on

December 19, 1985, the Board of Estimate requested that any future designations be presented to it at one time, rather than in a piecemeal fashion (A3092-3093).[2]

After the three August 1985 designations, determinations with respect to the remaining theatres under consideration were postponed by the Landmarks Commission, at the request of petitioners, pending issuance by the Commission of proposed Guidelines designed to facilitate any changes in the exteriors and interiors of Landmark theatres later considered necessary by the owners for production or other purposes (A3093, A3118-3125). These Guidelines were adopted by the Landmarks

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[2] Pursuant to Landmarks Law §25-303, the Board of Estimate, at the time the designations at issue here were made, had the power to modify or disapprove the actions of the Landmarks Commission.

Commission, after a public hearing, on December 10, 1985 (A3118).[3]

Between November 4, 1987 and January 5, 1988, the Landmarks Commission designated the interior and exterior of nineteen theatres, the interior only of seven theatres, and the exterior only of two theatres (A3095-3097). Thirteen theatres were not designated (A3097). Twenty-two of the twenty-eight designated theatres, as well as a number of the thirteen non-designated theatres, are owned by petitioners (A3097). Within five days of each designation, the Commission filed the designation reports for the theatres with the Board of Estimate (A3097), which then, pursuant to Landmarks

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[3] Despite their formal adoption, it is apparently these Guidelines to which petitioners refer in footnote 5 of the instant petition, where they inexplicably discuss the Commission's "informal relaxation of the rules."

Law § 25-303(g), also received a report from the City Planning Commission regarding the relationship of the designated property to the Zoning Resolution, projected public improvements, and any plans for development of the area involved (A3081).

After a public hearing on March 10, 1988, the Board of Estimate ratified the designations of all the subject theatres in one vote (A3097, A3116-3117). The practice of having a single vote on related matters had been used by the Board of Estimate since at least 1950 and, more specifically, had been routinely employed in approving other Landmark designations (A3117, A3136-3145).

(2)

The Zoning Resolution and the "Special Demolition Permit"

On December 7, 1967, at least ten years before the Landmarks Commission had even begun considering whether individual

Broadway theatres were worthy of Landmark status, the Board of Estimate, acting in the exercise of its zoning power, approved a proposal by the City Planning Commission to create a Special Theatre District (A3042-3043). As a result, the New York City Zoning Resolution was modified to provide theatre owners with certain economic incentives designed to promote the City's goal of preserving, protecting and promoting "the character of the Special Theatre District area as the location of the world's foremost concentration of legitimate theatres, an attraction which helps the City of New York achieve pre-eminent status as a cultural showcase, an office headquarters center and a cosmopolitan residential community" (A3042-3043).

On May 13, 1982, almost fifteen years after establishment of the Special Theatre District and one month after the Landmarks

Preservation Commission had separately voted to calendar public hearings concerning the designation of certain theatres as Landmarks, New York City's Zoning Resolution was further modified by a series of amendments, known as the "Midtown Zoning Amendments," designed to shift development from the east side to the west side of Manhattan (A3043-3044). Several provisions related to Broadway theatres. The "Special Theatre Subdistrict" became the "Theatre Subdistrict of the Special Midtown District" (A3045). The special incentives and controls established in 1967 for the "preservation and rehabilitation of existing theatres" were continued and, in certain cases, augmented (A3045).

In addition, the 1982 amendments listed forty-four theatres which could not be demolished without a special permit issued by the City Planning Commission (hereafter,

"listed theatres").[4] For applicants unable to meet the criteria for issuance of this demolition permit, the legislative scheme provided a hardship exception to the requirement in the form of a variance. See, ZR § 72-01(b). Listed theatres were separately granted increased flexibility in transferring unused development rights (A3047-3048). See, ZR §§ 81-743, 81-746.

On February 5, 1987, Phase I of a comprehensive plan developed by the Planning Commission for the Theatre Subdistrict was enacted by the Board of Estimate (A3054). Among other things, it instituted urban design controls intended "to

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[4] New York City's Zoning Resolution requires demolition permits in numerous other instances. See, e.g., ZR § 103-108 (Preservation Area of the Special Clinton District); ZR § 109-522 (specified buildings in the Special Little Italy District); ZR § 103-07 (Special Planned Community Preservation Districts).

preserve, protect and enhance the character of the theatre subdistrict." ZR § 81-00(h).

Phase II of the comprehensive plan was approved by the Board of Estimate on October 29, 1987 (A3054). Several provisions of the 1982 amendments inuring uniquely to the benefit of theatre owners were modified and made permanent, including the enhanced ability to transfer unused development rights (A3055, A3058-3059). The special demolition permit requirement of ZR § 81-742 was similarly made permanent (A3054-3060). Under the Phase II revisions, however, "listed theatres" which had also been given Landmark status were no longer required to obtain a special demolition permit from the Planning Commission if the Landmarks Commission, after the hardship hearing permitted by Landmarks Law

§ 25-309, had separately authorized demolition (A3058-3059).[5]

The third and final phase of the comprehensive plan was adopted on April 28, 1988. Among other provisions affecting theatre owners, it created a theatre retention bonus designed to encourage owners to maintain use of a given building as a legitimate theatre. In return for such a commitment, the Zoning Resolution permitted even further flexibility with respect to development rights (A3061-3063).[6]

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[5] No one has ever applied for a special demolition permit pursuant to ZR § 81-742 since institution of the requirement in 1982, nor has the owner of any landmarked theatre ever applied under Landmarks Law § 25-309 (A3060).

[6] Contrary to petitioners' assertion that these rights have no value, over one-third of the theatres at issue in this case have already realized their development potential, or can readily do so (A2454-2456).

(3)

Petitioners' Legal Challenge

A special proceeding to review the Landmarks Commission's designations is available in the New York courts for owners who contend that their property is not of Landmark quality. See, Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922 (1980). On June 20, 1988, petitioners instituted a proceeding combining this statutory review mechanism with a request for declaratory relief (A2338-2342, A2364).

As relevant to the instant petition, petitioners alleged (1) that the Landmarks Law was unconstitutional on its face, and (2) that its specific application to the theatres in question constituted a taking of property without just compensation. The special demolition permit provision in ZR § 81-742 was similarly attacked as unconstitutional on

its face, on the grounds that it allegedly (1) discriminated against theatre owners, and (2) failed to exempt theatres not making a reasonable economic return. Petitioners sought $200 million in unspecified damages (A2364).

Both sides moved for summary judgment (A2819-2821, A2822-2829). Oral argument on the motions was heard on January 12, 1989 (A50-164).[7] Judgment in favor of respondents was entered on February 6, 1990.

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[7] During the course of oral argument, a question arose as to whether testimony was required concerning the voting procedure employed by the Board of Estimate (A154-158). Petitioners' attorney argued that an evidentiary hearing on the matter was necessary because "the constitutional integrity" of the "process" had been put in issue (A217). The limited question of whether the Board of Estimate had departed from its customary procedures in voting on the theatre designations was ultimately resolved in respondents' favor on the basis of affidavits (A3136-3135, A3146-4774).

(4)

Opinion of the Motion Court

After reviewing a 7,000 page record, the Motion Court approved the challenged designations of the 22 theatres, holding that the Landmarks Commission had properly applied the statutory criteria to each of the buildings so designated (A28-29, A32). It further found that the designation process was not accomplished in an arbitrary, capricious, or otherwise illegal manner (24a-28a).[8]

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[8] Petitioners had contended, inter alia, that respondents were improperly using the Landmarks Law to regulate an industry; that there had been irregularities involved in the votes of both the Landmarks Commission and the Board of Estimate; and that the interiors of certain theatres had been improperly designated as Landmarks. While these charges are echoed in the brief supporting the instant petition for certiorari, petitioners have not used them directly as a basis for requesting review by this Court.

With respect to the general constitutional attack on the validity of the Landmarks Law set forth in petitioner's sixth cause of action, the Motion Court noted that this represented a facial challenge to the legislation (24a). It therefore rejected respondents' contention that the matter was not ripe for review (24a). It agreed with respondents, however, that the matter had been disposed of by this Court's decision in Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978) (28a-31a).

The Motion Court separately considered petitioner's claim, in their tenth cause of action, that designation of the various theatres as Landmarks constituted a prohibited "taking" of property without just compensation (40a-42a). It found without merit petitioners' contention that application of the Landmarks Law to the subject theatres

lacked the "causal relationship" deemed necessary by this Court in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), for a statute to survive a "takings" challenge (41a-42a). The Motion Court noted that, in Penn Central Transportation Co. v. City of New York, supra, the Landmarks Law was found to substantially advance a legitimate state interest in preserving Grand Central Station (41a). The Court then specifically held that the statute also substantially advanced an equally legitimate government interest in preserving certain Broadway theatres (41a-42a).[9]

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[9] The Motion Court further rejected, as unsupported by the evidence, petitioners' allegation, in their eleventh cause of action, that they had been damaged in the amount of $200 million (42a). Noting that it was unclear whether this claim was asserted with respect to the value of the alleged "taking," or instead represented the diminished value of development rights, the Court held that (Footnote Continued)

With respect to the alleged constitutional infirmities of the Zoning Resolution's separate special demolition permit requirement, the Motion Court was again of the view that petitioners had mounted a facial attack on the validity of the provision (24a). However, it held that petitioners had not met their "heavy burden" of demonstrating, beyond a reasonable doubt, the unconstitutionality of ZR § 81-742 (31a-40a).

More specifically, the Motion Court concluded that because, inter alia, demolition permits are required in other "special districts" and no one particular property was singled out here, ZR § 81-742 does not constitute discriminatory "spot zoning" or "reverse spot zoning" (37a-39a). It further

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(Footnote Continued)
no probative evidence supported either theory (42a).

held that the availability of hardship relief through other provisions of the Zoning Resolution rendered untenable the second prong of petitioners' assault on the constitutionality of the permit requirement, i.e., its alleged failure to exempt financially unviable properties (39a-40a).

(5)

Opinion of the Intermediate State Appellate Court

In an opinion reported at 166 A.D.2d 115, 570 N.Y.S.2d 504, the Appellate Division, First Department, agreed with the lower court that, to the extent petitioners were mounting a facial attack on the constitutional validity of the Landmarks Law, this Court's decision in Penn Central, supra, disposed of the matter (6a-7a). The Appellate Division rejected petitioners' contention that Penn Central involved a challenge, under the Takings Clause, to the consequences of landmarking, whereas their

challenge was to the method or process of designation (6a-7a). It also pointed out that petitioners had not met their heavy burden of demonstrating that the Landmarks Law as applied to the theatres in question deprived them of the essential use of their property (7a).

The Court further held that, insofar as petitioners were claiming that they had been deprived of the economic use of their property, the matter was not ripe for review because petitioners had not made use of the various statutory mechanisms available to owners seeking to alter or renovate a landmarked structure (7a).

With respect to the attack on the special demolition permit, the Court noted that this was a zoning, rather than a landmarking matter (7a). As such, petitioners again bore the "heavy burden" of demonstrating the provision's unconstitu-

tionality (7a). According to the Court, this burden had not been met because there was no evidence that the requirement was not based on a comprehensive plan or lacked a rational basis (7a-8a).

(6)

Actions of the New York State Court of Appeals

On September 19, 1991, the New York State Court of Appeals dismissed petitioners' purported appeal as of right seeking review on constitutional grounds. See, 78 N.Y.2d 1006, 580 N.E.2d 1059, 575 N.Y.S.2d 456.

On December 18, 1991, the same Court refused to grant leave to appeal. See, 78 N.Y.2d 751, 587 N.E.2d 289, 579 N.Y.S.2d 651.

SUMMARY OF ARGUMENT

Owners of buildings which have been designated Landmarks who contend that their property is not of landmark quality can readily obtain review of the Commission's

determination in a special proceeding brought pursuant to Article 78 of New York's Civil Practice Law and Rules. The instant petitioners sought such review, and the New York courts unanimously found that the theatres in question met the statutory criteria for designation as Landmarks.

Once a property has been so designated, the New York City Landmarks Law provides a permit mechanism whereby the owner may seek permission to alter or even demolish a landmarked property on several grounds, including economic hardship. The instant petitioners never sought such relief. Accordingly, their claim that application of the statute to the individual theatres violated the Takings Clause of the Fifth Amendment is premature. As this Court has noted on several occasions, it is impossible to evaluate whether a "taking" has occurred until an

owner has obtained a final decision concerning the application of a given statute to the property in question.

Under such circumstances, this Court should also decline petitioners' further invitation to reconsider its determination in Penn Central upholding the validity of the Landmarks Law. Not only was that determination reaffirmed by this Court just five years ago in Nollan, petitioners have pointed to absolutely no conflict in the lower state or federal courts which might require such reconsideration. Petitioners' request is simply a desperate attempt to avoid what every other court which has reviewed the matter has found to be the Landmark Commission's proper application to the subject theatres of a constitutionally valid law.

Finally, the suggestion that the separate "special demolition permit"

requirement of New York City's Zoning Resolution constitutes reverse spot-zoning is completely without merit. Here, too, since no theatre owner has ever applied for such a permit, and since the Zoning Resolution makes available a means of avoiding the application of ZR § 81-742 in the form of a variance, the facts are not ready for review. Furthermore, the existence of a comprehensive plan for the Theatre Subdistrict disposes of petitioners' claim that whatever "discrimination" this special zoning tool may accomplish is constitutionally suspect.

REASONS FOR DENYING THE WRIT

POINT ONE

SINCE PETITIONERS FAILED TO MAKE USE OF THE STATUTORY MECHANISMS DESIGNED TO RELIEVE A PROPERTY OWNER FROM ECONOMIC HARDSHIP ALLEGEDLY CAUSED BY DESIGNATION OF A BUILDING AS A LANDMARK, THE APPELLATE DIVISION PROPERLY HELD THAT PETITIONERS' CONSTITUTIONAL CLAIMS WERE PREMATURE.

This case does not present a novel question. In reviewing the designation as a Landmark of each of the subject theatres, the New York courts followed well-established law. As presented by petitioners, what they term their "as-applied" challenge to the validity of the Landmarks Law is not ripe for review by the courts.

Where a property owner claims that government action, through statute or regulation, is so restrictive as to effect an unconstitutional taking of a particular piece

of property, the claim is premature unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Williamson Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985). Accord, MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349 (1986); Seawall Associates v. City of New York, 74 N.Y.2d 92, 107, n. 7, 542 N.E.2d 1059 (1989), cert. denied sub nom. Wilkerson v. Seawall Associates, 493 U.S. 976 (1989); Parkview Associates v. City of New York, 71 N.Y.2d 274, 282, 519 N.E.2d 1372 (1988), cert. denied, 488 U.S. 801 (1988); Church of St. Paul and St. Andrew v. Barwick, 67 N.Y.2d 510, 496 N.E.2d 183 (1986), cert. denied, 479 U.S. 985 (1986).

This so-called "ripeness" doctrine precludes consideration of petitioners'

takings claims insofar as they concern the effect of the landmark designations on the viable economic use of the subject properties. To the extent that petitioners wish to alter or to demolish the designated landmark theatres, three separate avenues are available to them to seek administrative approval for such action: an application for (1) a certificate of no effect, Landmarks Law § 25-306; or (2) a certificate of appropriateness, whose issuance is based on aesthetic criteria, Landmarks Law § 25-307; or (3) a certificate of appropriateness, authorizing demolition, alterations, or reconstruction and issued on the ground of "insufficient return," if the applicant can show financial hardship in accordance with the provisions specified in § 25-309 of the Landmarks Law. See Penn Central, supra, 438 U.S. at 137.

Petitioners have not shown any specific instance where the designation of their properties as Landmarks has unduly restricted any specific plan to alter, improve, or demolish the subject theatres. Until such time as this occurs, their "takings" claim is premature.

Petitioners, in an apparent attempt to divert attention from the ripeness problem, allege that the New York courts, in general, have misread Penn Central, routinely refusing to engage in any inquiry into the effect of the regulation as applied. As this Court pointed out in MacDonald, Sommer & Frates v. Yolo County, supra, however, such an inquiry cannot be undertaken until a final decision has been rendered by the appropriate agency concerning the extent of the restrictions imposed on the property in question, a determination which has not even been requested here. Id. at 350.

This fact disposes of petitioners' suggestion that the Appellate Division erred in approving the Motion Court's decision not to permit an evidentiary hearing -- a hearing which, in any event, petitioners had originally requested for the purpose of clarifying the Board of Estimate's voting procedures, not, as suggested in the instant petition, to explore the alleged economic effects of Landmark designation. See, note 7, supra, and the Appellate Division's decision (5a, 8a).[10] It also disposes of the further suggestion that the Landmarks Commission itself erred in not considering economic evidence in connection with the designation process. Under the terms of the

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[10] At the Appellate Division, petitioners claimed that the evidentiary hearing would instead have inquired into whether the Landmarks Commission was improperly attempting to regulate an industry (5a).

statute, the permit mechanism is designed to take such factors into account after the initial designation determination has been made.

In sum, since the ripeness doctrine was properly applied by the Appellate Division in the case at bar, there is no basis on which this Court can reach the wider-ranging questions suggested by petitioners as sufficient to require review of their as-applied takings challenge.[11]

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[11] Although petitioners have asked this Court to review the constitutionality of the Landmarks Law "as applied" to the designations of the individual theatres, they appear to have confused an "as applied" challenge with the second prong of the test to determine facial validity of a land-use regulation set forth in Nollan, i.e., the requirement that the owner demonstrate he has been denied "economically viable use of his land." 483 U.S. at 834. The Appellate Division properly found that petitioners had not met this prong of the test, since their claim reduces to the assertion that infringement of their unfettered right to do

(Footnote Continued)

POINT TWO

SINCE THIS COURT SPECIFICALLY UPHELD THE CONSTITUTIONALITY OF THE LANDMARKS LAW IN PENN CENTRAL, AND THEN REAFFIRMED THAT HOLDING IN NOLLAN, THE NEW YORK COURTS PROPERLY HELD THAT THE NEW YORK CITY LANDMARKS COMMISSION WAS AUTHORIZED TO DESIGNATE CERTAIN BROADWAY THEATRES AS LANDMARKS.

The unanimous rejection of petitioners' claims by the reviewing courts is fully in accord with well-established law and was, in fact, compelled by this Court's decision upholding the facial validity of the Landmarks Law in Penn Central. Since that decision was reaffirmed only five years ago in Nollan, petitioners are left with no recourse but to invite this Court to

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(Footnote Continued)
as they please with their property is sufficient to establish a "taking." This Court specifically rejected such a proposition in Penn Central, supra, 438 U.S. at 130.

readdress the issue. Indeed, the desperateness of their situation is seen in the fact that petitioners acknowledge "[t]he affirmative power of government to designate properties as landmarks, and thereby restrict or limit the rights of ownership," Petition at p. 10, while at the same time requesting that this Court strike down landmarking statutes in general, as well as New York City's Landmarks Law in particular.

The resulting conceptual muddle is not resolved by the reasons petitioners offer to justify their request. They do not point to any conflict in the lower state or federal courts resulting from this Court's analysis in Penn Central. Instead, they appear to equate all land-use regulation with zoning and then suggest that "takings" jurisprudence should be rewritten from that

perspective. We believe that this Court should decline the invitation.

First, the charge that landmark preservation, as an activity, fails to provide the "average reciprocity of advantage" discussed in such cases as Pennsylvania Coal Company v. McMahon, 260 U.S. 393, 415 (1922), has already been resolved, and petitioners offer no reason why it should be reconsidered. This Court rejected, in Penn Central, the claim that owners of landmarked buildings do not enjoy a reciprocity of advantage from the landmarking: "Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and structures, ... -- which we are unwilling to do -- we cannot conclude that the owners of the Terminal have in no sense been benefitted by the Landmarks Law." 438 U.S. at 134-35.

Secondly, it is well established that, where the facial validity of a land-use statute is attacked under the Takings Clause, the test is not whether the legislation is part of the "comprehensive plan" peculiarly characteristic of zoning regulations, which petitioners claim is necessary to establish reciprocity of advantage, but whether the statute or ordinance "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987), quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980). Accord, Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 485, 495 (1987). In effect, what petitioners are asking this Court to do is to narrow the first prong of the Nollan test to require that a statute challenged on its face embody a

"comprehensive plan" rather than serve to "substantially advance legitimate state interests," and then to further narrow "comprehensive plan" to the meaning of that term in a zoning context.

We respectfully submit that this is a species of semantic legerdemain which would serve no purpose, since not all land-use regulation is a species of zoning. In other words, there is no reason for this Court to reiterate what it has stated twice before, in Penn Central, 438 U.S. at 138, and in Nollan, 483 U.S. at 834-835, i.e., that landmark preservation substantially advances a legitimate state interest and is therefore a constitutionally acceptable activity.

POINT THREE

THE APPELLATE DIVISION PROPERLY HELD THAT THE ZONING RESOLUTION'S "SPECIAL DEMOLITION PERMIT" DID NOT CONSTITUTE REVERSE SPOT-ZONING.

As discussed on pages 10-13, supra, the Zoning Resolution's special demolition permit, which requires an owner of a "listed" theatre to obtain a permit from the City Planning Commission prior to demolition of the structure, is a tool legitimately employed in many of the City's specialized zoning districts. The provision itself permits demolition if its requirement are met, ZR §81-742, and the Zoning Resolution contains a further hardship exception in the form of an application for a variance. ZR §72-01(b). No "listed theatre" has ever applied for the permit.

Under these circumstances, the same ripeness considerations discussed in Point One, supra, are also controlling here.

Indeed, this conclusion is compelled by petitioners' articulated objection to the permit, to wit, their complaint that the City Planning Commission is permitted, but not required, to condition issuance of the permit on the applicant's agreement to allocate a certain portion of any new structure to entertainment-related uses. In other words, the event on which petitioners premise their claim of impermissible reverse spot-zoning may or may not occur, and, if it does, there is further provision in the statute for a variance.[12]

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[12] To the extent that petitioners make the additional claim, in the "Questions Presented" section of the petition, that the special demolition permit impermissibly freezes the use of a building, we note again, (1) that the permit itself allows demolition if its requirements are met; (2) that a further variance mechanism is available; and (3) that several theatres have in fact converted their use from theatrical productions to other forms of business activity (A3108).

Nor is the provision subject to facial attack. The purpose of zoning, unlike the purpose of landmark preservation, is to regulate the use of land, and where, as here, there is special treatment of a lot, area, or category, it is not illegal as long as any such "discrimination" is in accord with a comprehensive plan. See, e.g., Town of Islip v. Caviglia, 73 N.Y.2d 544, 553, 540 N.E.2d 215 (1989); Golden v. Planning Board of the Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 219 (1972), appeal dism'd, 409 U.S. 1003 (1972).

Appropriate planning objectives include not only enhancement of the quality of life for a municipality's residents, as in Town of Islip, supra, and direction of new development, as in Golden, supra, but preservation of an area for economic purposes, Marcus Associates v. Town of Huntington, 45 N.Y.2d 501, 507, 382 N.E.2d

1323 (1978), and limiting conversion of premises from commercial to residential use to prevent displacement of businesses. Walkbroadway Realty, Inc. v. New York City Board of Standards and Appeals, 120 A.D.2d 998 (1st Dept.), appeal dism'd, 68 N.Y.2d 804, 498 N.E.2d 431 (1986), appeal dism'd, 479 U.S. 1073 (1987).

Here, petitioners did not even attempt to argue below that the required "comprehensive plan" for the Theatre Subdistrict does not exist -- as, indeed, they could not. See, discussion on pages 9-13, supra. The special demolition permit provision merely aids in furthering the objectives of this plan, i.e., to preserve and encourage development of the Broadway

theatre area as a viable part of the City's economic and cultural life.[13]

In sum, the Appellate Division properly rejected petitioners' theory that any statutory "discrimination" is a per se evil, concluding instead that the City's comprehensive plan for the Theatre Subdistrict constituted sufficient justification for institution of the special permit requirement. See, Lighthouse Shores, Inc. v. Town of Islip, 41 N.Y.2d 7, 12, 359

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[13] The existence of this plan also renders readily distinguishable such cases as Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381 (1976), cert. denied, 429 U.S. 990 (1976), where the Court found that the legislation in question did not have a substantial relation to a "legitimate government purpose." Nor does Vernon Park Realty v. City of Mt. Vernon, 307 N.Y. 493, 121 N.E.2d 919 (1954), provide any support for petitioners, since the special permit requirement has nothing to do with the use of a listed theatre, but merely prohibits demolition unless certain requirements are met.

N.E.2d 337 (1976) (a statutory discrimination will not be set aside "if any state of facts may reasonably be conceived to justify it"). See also, United States v. Carolene Products, 304 U.S. 144 (1938) (legislation enacted pursuant to the police power will be upheld as constitutional if it bears a rational relationship to a legitimate government interest). In light of the facts, the nature of the statutory scheme, and the controlling case law, petitioners' claim of illegal reverse spot-zoning is untenable.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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